

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Bonner Properties, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ending 9/30/74. :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of April, 1984, he served the within notice of Decision by certified mail upon Bonner Properties, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Bonner Properties, Inc.
22 Chambers St.
Princeton, NJ 08540

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
6th day of April, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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of :
Bonner Properties, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
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Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Year Ending 9/30/74. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of April, 1984, he served the within notice of Decision by certified mail upon William Bush, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Bush
c/o Reavis & McGrath
345 Park Avenue
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
6th day of April, 1984.

David Parchuck

James C. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

April 6, 1984

Bonner Properties, Inc.
22 Chambers St.
Princeton, NJ 08540

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
William Bush
c/o Reavis & McGrath
345 Park Avenue
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
BONNER PROPERTIES, INC.	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Fiscal Year	:	
Ending September 30, 1974.	:	

Petitioner, Bonner Properties, Inc., 22 Chambers Street, Princeton, New Jersey 08540, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ending September 30, 1974 (File No. 25174).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 29, 1982 at 1:15 P.M., with all briefs to be submitted by April 22, 1983. Petitioner appeared by Reavis & McGrath (William Bush, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether the gain realized by petitioner from the sale of an apartment development in Virginia is properly included in its entire net income for purposes of determining its New York franchise tax liability.

FINDINGS OF FACT

1. On June 23, 1978, the Audit Division issued against petitioner, Bonner Properties, Inc., a Statement of Audit Adjustment alleging additional corporate franchise taxes due under Article 9-A of the Tax Law for petitioner's fiscal

year ending September 30, 1974 in the amount of \$168,048.00 plus interest. The following explanation was provided:

"Business income and business capital are allocated by a three factor formula consisting of tangible property, receipts and payroll which provides for an equitable tax. There is no provision of law to exclude the capital gain from the sale of real estate from entire net income.

In computing entire net income, federal taxable income must be adjusted adding to it all interest income which has not been included in computing federal taxable income, such as interest on state and municipal bonds and certain obligations of the United States and its instrumentalities."¹

The alleged deficiency was computed as follows:

Federal taxable income before net operating loss deduction and special deductions	\$4,788,856
Interest on federal, state, municipal and other obligations not included in federal taxable income	128,190
New York State franchise tax deducted	2,916
Total	\$4,919,962
50% of dividends from non-subsidiary corporations	18,216
Adjusted entire net income	\$4,901,746
Business allocation percentage	39.99%
Taxable income	\$1,960,208
Tax @ 9%	176,419
Tax per report	10,477
Deficiency	165,942
Plus balance due per attached CT-412.1	2,106 ²
Total Deficiency	\$ 168,048

2. On December 8, 1978, the Audit Division issued a Notice of Deficiency against petitioner asserting a corporate franchise tax deficiency of \$168,048 plus interest.

¹ Petitioner did not challenge the adding of interest income to its federal taxable income.

² This amount is not at issue herein.

3. Petitioner³ filed a Form CT-3, New York State Corporation Franchise Tax Report, for its fiscal year ending September 30, 1974 on which it reported entire net income of \$4,780,437. However, rather than using this amount to calculate its New York corporate franchise tax liability, petitioner applied a business allocation percentage of 39.99 percent against \$10,812, an amount which petitioner described on its return as "income applicable to New York". Because its tax liability measured on such income was less than the tax measured on allocated capital, petitioner used the latter method of calculating its tax liability.

4. Petitioner, a Delaware corporation, was organized in 1951 for the purpose of constructing a Norfolk, Virginia, low-income apartment development, Robin Hood Apartments,⁴ which consisted of 1,500 two-bedroom apartments, more than half of which were furnished apartments during the year at issue.

5. On March 24, 1971, Bonner Realty and Construction Corporation, an inactive Delaware corporation, and Bertram Garden Apartments, Inc. ("Bertram Garden"), a New York corporation, were merged into petitioner. Bertram Garden owned a middle-income garden apartment development in Flushing, New York consisting of 176 apartments. Bertram Garden and Robin Hood Apartments were both constructed in 1951-1952 by the Bertram F. Bonner family, although legal ownership was by separate corporate entities.

³ On November 6, 1974, Virginia Construction Corporation amended its Certificate of Incorporation and changed its name to Bonner Properties, Inc. Petitioner's tax report for the period at issue was filed under its former name of Virginia Construction Corporation.

⁴ The original name of the development was Azalea Garden Apartments. Its mortgage was guaranteed by the Federal Housing Administration.

As a result of the merger, petitioner became the owner of the New York apartment development. Consequently, as of March 24, 1971, the date of the merger, petitioner commenced business in New York.

6. Petitioner actively managed Bertram Garden out of its New York City office at 127 East 59th Street in Manhattan, while Robin Hood Apartments was managed by Drucker & Falk, a Virginia professional management company hired by it. The two businesses were operated separately with the maintenance of separate books and records. Receipts were deposited and expenses paid through separate bank accounts. There were no transactions between Bertram Garden and Robin Hood Apartments.

7. On December 31, 1973, petitioner sold the Robin Hood Apartments and realized a capital gain of \$4,808,878. It filed a Virginia Corporation Income Tax Return for the period at issue and reported taxable income of \$4,568,979 for the purposes of the Virginia tax and paid corporation income tax of \$274,139 to Virginia.

8. Mr. Louis A. Margold, a member of the accounting firm of Margold, Erskine & Wang, testified that his firm prepared petitioner's New York corporate franchise tax report for the period at issue and that the gain realized from the sale of the Robin Hood Apartments in Norfolk, Virginia, was not included in the return for the following reason:

"We felt that it would be improper to show it in the State of New York because the property was without the state and had nothing to do with the state. We felt it would be unfair, unreasonable, to reflect the gain derived from that property.

* * *

"(I)n the State of Virginia there was a requirement that no allocation of any gain be made from the sale of property that was located in the State of Virginia. As a result of which we felt that if we were paying a full tax to the State of Virginia that it is unwarranted for New York State to apply the percentage formula that they generally do to a situation of this kind."

Mr. Margold further testified that an allocation percentage was not applied in computing the New York tax for the period at issue. However, petitioner, on its tax return, applied a business allocation percentage of 39.99 percent which it determined as follows:

	<u>New York</u>	<u>Everywhere</u>
Real estate owned	\$1,448,000	\$2,620,000
Percentage in New York State		55.27%

Receipts in the regular course of business:

Rentals of property	\$389,804	\$793,604
Percentage in New York State		49.11%
Wages, salaries, and other compensation of employees	\$24,546	\$157,538
Percentage in New York State		15.58%
Business allocation percentage		39.99%
(Total of three percentages divided by three)		

CONCLUSIONS OF LAW

A. That Tax Law §208.9 defines "entire net income" as "total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department...". Pursuant to Tax Law §210.3(a), property, business receipts and payroll are taken into account in arriving at the percentage of business income to be allocated to New York.

B. That by its request to exclude the gain from the sale of its Virginia property from its business income, petitioner has called upon the State Tax Commission to exercise the discretionary power conferred by Tax Law §210.8 to resort to a method other than the statutory three-factor formula to effect a fair and proper allocation of its income reasonably attributable to New York.

C. That "a franchise tax should bear a reasonable relationship to the privilege granted, and if the assessment is all out of proportion to the amount

of business done within this State, it is arbitrary and unreasonable." People ex rel. Sheraton Bldgs. v. Tax Commission, 15 A.D. 142, at 144, aff'd, 13 N.Y.2d 802. The taxable income of \$1,960,208.00 determined by the Audit Division by its inclusion of the gain on the sale of the Virginia property is almost two hundred times the actual income earned by petitioner through its activities in New York for the year at issue. In addition, petitioner paid a substantial tax on its gain from the sale of the Virginia property to the State of Virginia.

We note further that petitioner conducted business in New York for less than three years prior to its sale of the Virginia property which it had owned for over twenty years and that the two apartment developments were separate and distinct operations as noted in Finding of Fact "6", herein. Therefore, it would be inequitable not to permit petitioner to exclude the gain from the sale of the Virginia property from its entire net income for the period at issue. Furthermore, merely permitting petitioner to include the gain in its receipts factor would only reduce the business allocation percentage from 39.99 percent to 25.95 percent and the resulting tax liability would still remain inequitable and arbitrary in light of People ex rel. Sheraton Bldgs. v. Tax Commission, supra.

Cf. A.E. Bruggemann & Co., Inc. v. State Tax Commission, 349 N.Y.S.2d 28, where the court held that it was proper under Tax Law §210.8 to determine New York corporate franchise taxes by a separate accounting of the activities of a corporation which had income in New York and losses in New Jersey. "(T)he Tax Commission was justified in using such figures (the corporation's net income derived from doing business in New York) for tax purposes and was not required, as a matter of law, to allow an offset of the losses sustained by the

corporation in the operation of its business in the State of New Jersey."

A.E. Bruggemann & Co., Inc., 349 N.Y.S.2d at 30.

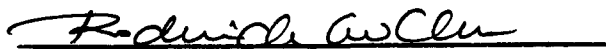
D. That the New York corporation franchise tax is measured by one of three alternative bases if a greater tax will result than from a tax measured on entire net income. Because we are permitting petitioner to exclude the gain at issue from its entire net income, the resulting tax measured on entire net income is less than the tax measured by capital allocated to New York which was, in fact, the measure used by petitioner, as noted in Finding of Fact "3", supra, on its tax return. Consequently, the tax liability actually reported and paid by petitioner was correct (although petitioner improperly determined income applicable to New York).⁵

E. That the petition of Bonner Properties, Inc. is granted to the extent noted in Conclusions of Law "C" and "D", supra, and the Notice of Deficiency herein is cancelled.

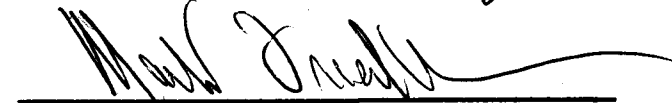
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

⁵ Petitioner applied a business allocation percentage against \$10,812, as noted in Finding of Fact "3", supra, to determine its taxable income. Our calculation, which permits the exclusion of the gain at issue, results in entire net income of \$92,868 against which a business allocation percentage would be applied to determine petitioner's taxable income. However, even using this larger amount results in a tax which is less than the tax of \$10,477 measured on capital which was reported and paid by petitioner.